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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

KANE COUNTY, UTAH, et al., Plaintiffs, v. SALLY JEWELL, in her capacity as Secretary of the Interior, et al., Defendants, and WILDEARTH GUARDIANS, SIERRA CLUB, WESTERN ORGANIZATION OF RESOURCE COUNCILS, GRAND CANYON TRUST, and CENTER FOR BIOLOGICAL DIVERSITY, Proposed Defendant-Intervenors.	Case No. 2:16-cv-01211-DBP **MOTION TO INTERVENE AS DEFENDANTS** Honorable Dustin B. Pead

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WildEarth Guardians, Sierra Club, Western Organization of Resource Councils, Grand Canyon Trust, and Center for Biological Diversity (collectively, Conservation Groups) respectfully move under Federal Rule of Civil Procedure 24 to intervene as defendants in this action. Conservation Groups merit intervention because Plaintiffs Kane County, Utah, Garfield County, Utah, and Rural Utah Alliance (collectively, the Counties) seek relief that would harm Conservation Groups' interests by opening up public lands to environmentally harmful coal mining without adequate review of mining's environmental damage. The Counties' requested relief would reverse reforms that Conservation Groups support and undercut an ongoing review of the federal coal leasing program that could limit that damage and meaningfully modernize that program to better address environmental, climate, and fiscal concerns.

Conservation Groups satisfy the four-part test for intervention as of right under Federal Rule of Civil Procedure 24(a)(2). First, this motion is timely, as it is being filed before Defendants Sally Jewell, et al. (collectively, Federal Defendants) have answered the Complaint. Second, Conservation Groups have longstanding, intense interests in limiting coal mining's damaging impacts to the land, air, water, and climate of the American West. Third, a decision in the Counties' favor may impair Conservation Groups' interests in protecting the West's natural resources given coal mining's well-documented environmental harm. Finally, the Federal Defendants' broad mandate to balance multiple uses of federal lands (as opposed to Conservation Groups' narrow focus on protection of environmental values), their history of repeatedly favoring mining interests over Conservation Groups' interests in other coal mining litigation, and the incoming administration's stated hostility to the coal leasing pause that the Counties' challenge demonstrate that the Department of the Interior (DOI) may not adequately

represent Conservation Groups' interests. This Court thus should grant Conservation Groups intervention as of right. Conservation Groups also meet the test for permissive intervention, which this Court also should grant.

Counsel for Conservation Groups has conferred with attorneys for the Counties and Federal Defendants about this motion. The Counties indicated that they oppose this motion. Federal Defendants take no position.

BACKGROUND

I. THE FEDERAL COAL LEASING PROGRAM IS OUTDATED.

The Bureau of Land Management (BLM) is the federal agency charged with managing coal resources on 570 million acres of public land. Notice of Intent To Prepare a Programmatic Environmental Impact Statement To Review the Federal Coal Program and To Conduct Public Scoping Meetings, 81 Fed. Reg. 17,720, 17,721 (Mar. 30, 2016). BLM now manages nearly a half-million acres of coal leases, which account for over 40% of the nation's coal production. *Id.* Most federal coal is mined in western states, including Wyoming, Montana, Utah, Colorado, and New Mexico. *Id.* BLM manages federal coal pursuant to regulations adopted 37 years ago that envisioned two types of leasing: "(1) Regional leasing, where the BLM selects tracts within a region for competitive sale; and (2) Leasing by application, where an industry applicant nominates a particular tract of coal for competitive sale." *Id.* at 17,722. However, BLM abandoned regional leasing more than a quarter-century ago; all federal coal leasing now occurs only upon industry nomination. *Id.*

In the last few years, Congress and government watchdogs have found fault with BLM's outdated structure for management of federal coal. DOI's Office of the Inspector General in

2013 issued a report concluding that "BLM faces significant challenges in the areas of coal leasing and mine inspection and enforcement" and that BLM's poor management resulted in millions of dollars in lost royalties to the federal treasury.[1] The Inspector General made recommendations necessary to "enhance [BLM's] coal management program significantly."[2] And in 2013, the Government Accountability Office (GAO) concluded that BLM had failed to ensure mining companies pay fair market value for leasing federal coal. GAO determined that since 1990, "most" federal coal leases were not sold competitively and had only a single bidder.[3]

II. COAL MINING AND COAL COMBUSTION DAMAGE THE ENVIRONMENT AND HUMAN HEALTH.

Mining and burning coal damage the environment, human health, and private property. Surface coal mining, also known as strip mining, destroys all vegetation where it occurs, eliminating habitat, recreation, and other multiple use opportunities for years if not decades. *See* Stream Protection Rule, 80 Fed. Reg. 44,436, 44,442 (July 27, 2015). Strip mining also can disrupt hydrology and impair water quality. *Id.* at 44,439–42. Underground coal mining can cause black lung disease in miners, and also results in subsidence of surface terrain, which can damage roads, property, and structures above ground.[4]

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[1] Off. of the Inspector Gen., U.S. Dep't of the Interior, *Coal Management Program, U.S. Department of the Interior* 6, 19 (2013), attached as Ex. 1.

[2] *Id.* at 19.

[3] U.S. Gov't Accountability Off., GAO-14-140, *Coal Leasing: BLM Could Enhance Appraisal Process, More Explicitly Consider Coal Exports, and Provide More Public Information* 15 (2013), attached as Ex. 2.

[4] *See* Patrick Charles McGinley, *Climate Change and the War on Coal: Exploring the Dark Side*, 13 Vt. J. Envtl. L. 255, 285–87, 301–03 (2011).

Coal combustion also significantly degrades the environment and other values. Emissions from coal-fired power plants contain pollutants, including:

- Mercury and other heavy metals, which have been linked to both neurological and developmental damage in humans (particularly fetuses) and wildlife.[5]

- Sulfur dioxide (SO_2), which contributes to acid rain, and nitrogen oxides (NO_x), which contribute to smog. Both SO_2 and NO_x threaten human health through respiratory illness.[6]

- Particulate matter, which worsens smog, causes haze which obscures vistas, and can cause respiratory illness and lung disease.[7]

- Fly ash and bottom ash residues created when coal is burned at power plants. Pollution from fly ash can leach from ash storage and landfills into groundwater. Ash ponds can also burst, polluting streams and rivers.[8]

Both coal mining and coal combustion are also leading causes of greenhouse gas pollution, the key driver in human-caused climate change. Underground coal mining emits significant amounts of methane, a powerful greenhouse gas.[9] And coal combustion in the United States in 2015 produced 1.36 *billion* tons of carbon dioxide emissions — more than 70% of all

[5] *See, e.g.*, National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units, 77 Fed. Reg. 9304, 9307–08 (Feb. 16, 2012) (describing history of EPA's mercury and air toxics rulemaking); Comm. on the Toxicological Effects of Methylmercury, Bd. on Envtl. Studies & Toxicology, Nat'l Research Council, *Toxicological Effects of Methylmercury* 13–17, 147–249 (2000), attached as Ex. 3.

[6] U.S. Energy Info. Admin., *Coal & the Environment – Energy Explained*, http://www.eia.gov/energyexplained/?page=coal_environment (last updated Dec. 10, 2015), attached as Ex. 4.

[7] *Id.*

[8] *Id.*

[9] *See id.* ("In 2013, methane emissions from underground coal mining accounted for about 9% of total U.S. methane emissions and 1% of total U.S. greenhouse gas emissions (based on global warming potential).").

carbon dioxide emissions from electricity generation in the country.[10] DOI has estimated that 11% of U.S. greenhouse gas emissions are attributable to combusting federally mined coal.[11] Once it is emitted into the atmosphere, carbon dioxide can persist and add to climate change for centuries.[12]

Human-caused climate change has already caused, and is likely to continue to cause, a wide range of damaging impacts to property (from flooding and sea-level rise), agricultural productivity, human health, forest health, and biodiversity, particularly in the American West.[13] A 2016 study published in the Proceedings of the National Academy of Sciences concluded that human-caused climate change nearly doubled the area impacted by forest fire in the West over the last thirty years.[14] Snowpack has declined in most areas of Utah since the 1950s, and

[10] U.S. Energy Info. Admin., *Frequently Asked Questions, How much of U.S. carbon dioxide emissions are associated with electricity generation?*, http://www.eia.gov/tools/faqs/faq.cfm?id=77&t=11 (last updated Apr. 1, 2016), attached as Ex. 5.

[11] U.S. Bureau of Land Mgmt., *Federal Coal Program, Programmatic Environmental Impact Statement – Scoping Report* 5-31 (2017) [hereinafter *PEIS Scoping Report*], attached as Ex. 6.

[12] David Archer, et al., *Atmospheric Lifetime of Fossil Fuel Carbon Dioxide*, 37 Ann. Rev. Earth & Planetary Sci. 117, 131 (2009), attached as Ex. 7.

[13] *See, e.g.*, Intergovernmental Panel on Climate Change, *Climate Change 2014, Synthesis Report, Summary for Policymakers* 14–16 (2014), https://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5_SYR_FINAL_SPM.pdf, attached as Ex. 8; *see also PEIS Scoping Report* 5-48 (Ex. 6).

[14] John T. Abatzoglou & A. Park Williams, *Impact of anthropogenic climate change on wildfire across western US forests*, 113 Proc. Nat'l Acad. Sci. 11,770, 11,770 (2016), attached as Ex. 9; *see also id*. at 11,773 (stating human caused climate change "is projected to increasingly promote wildfire potential across western US forests in the coming decades and pose threats to ecosystems, the carbon budget, human health, and fire suppression budgets").

temperatures in the state have risen two degrees Fahrenheit in the last century.[15]

Such changes are likely to continue and worsen. A 2016 peer-reviewed article predicted that the chance of a "megadrought" — a period of "aridity as severe as the worst multiyear droughts of the 20th century [that] persist[s] for decades" — in the American Southwest (including Utah) occurring before the end of the century is between 70% and 99%, due largely to human-caused climate change.[16] And the 2014 National Climate Assessment predicted that in the American Southwest, climate change would result in snowpack and streamflow declines that damage agricultural economies and would increase fire risks to forests and neighboring communities, and that increased heat would threaten public health and increase health care costs, particularly in cities.[17]

To prevent the worst consequences of climate change, a 2015 peer-reviewed article in the prestigious research journal *Nature* concluded that 80% of global coal reserves, including 92% to 95% of U.S. coal reserves, must be left in the ground.[18]

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[15] U.S. Envtl. Prot. Agency, *What Climate Change Means for Utah* (2016), https://www.epa.gov/sites/production/files/2016-09/documents/climate-change-ut.pdf, attached as Ex. 10.

[16] Toby R. Ault, et al., *Relative impacts of mitigation, temperature, and precipitation on 21st-century megadrought risk in the American Southwest*, 2 Sci. Advances e1600873, at 1 (Oct. 5, 2016), attached as Ex. 11.

[17] Press Release, The White House, Fact Sheet: What Climate Change Means for Utah and the Southwest (May 6, 2014), https://www.whitehouse.gov/sites/default/files/docs/state-reports/UTAH_NCA_2014.pdf, attached as Ex. 12.

[18] Christophe McGlade & Paul Ekins, *The Geographical Distribution of Fossil Fuels Unused When Limiting Global Warming to 2 °C*, 517 Nature 187, 189 (2015), attached as Ex. 13; *see also PEIS Scoping Report* 6-4 ("[N]umerous scientific studies indicate that reducing greenhouse gas emissions from coal use worldwide is critical to addressing climate change.") (Ex. 6).

III. CONSERVATION GROUPS HAVE LONG FOUGHT TO LIMIT COAL LEASING AND MINING ON PUBLIC LANDS.

The damaging impacts that coal mining and combustion have had, and will continue to have, on Western public lands, human health, and the global environment spurred Conservation Groups to press BLM to better regulate federal coal mining and limit its harmful impacts. For example, a number of Conservation Groups have challenged individual coal leases and rulemakings.[19] Conservation Groups also have supported agency policies and regulations to better regulate coal mining on federal lands, for example by pushing regulators to require better mine reclamation and by advocating that DOI impose a moratorium on new federal coal leasing until the agency could more fully consider the consequences.[20] One of the Groups (WildEarth Guardians) petitioned to reform the coal leasing program in the Powder River Basin, the source of the majority of federally mined coal; another of the Groups sued the Interior Department to require preparation of a programmatic review of the coal program.[21] And Conservation Groups have supported their members' efforts to convince federal decisionmakers to limit coal leasing and mining on public lands.[22] Conservation Groups and their members also have taken numerous actions to oppose expansion of the Alton Mine in southern Utah, such as filing

[19] *E.g.*, Decl. of Nathaniel Shoaff ¶ 4, attached as Ex. 14; Decl. of John Smillie ¶ 16, attached as Ex. 15; Decl. of Jeanie Alderson ¶ 5, attached as Ex. 16; Decl. of Mark Fix ¶ 5, attached as Ex. 17; Decl. of Jeremy Nichols ¶¶ 10–11, 22, attached as Ex. 18; Decl. of Michael Saul ¶¶ 4–5, attached as Ex. 19.

[20] *E.g.*, Shoaff Decl. ¶ 6 (Ex. 14); Smillie Decl. ¶¶ 3, 5, 13–16 (Ex. 15); Alderson Decl. ¶ 5 (Ex. 16); Fix Decl. ¶ 5 (Ex. 17); Nichols Decl. ¶¶ 9–10 (Ex. 18); Saul Decl. ¶¶ 4–5, 7 (Ex. 19); Decl. of Tim D. Wagner ¶ 3, attached as Ex. 20; Decl. of Tim D. Peterson ¶¶ 3–4, attached as Ex. 21.

[21] Nichols Decl. ¶ 11 (Ex. 18); *W. Org. of Res. Councils v. Jewell*, 124 F. Supp. 3d 7 (D.D.C. 2015), *appeal docketed*, No. 15-5294 (D.C. Cir. Oct. 28, 2015).

[22] *E.g.*, Shoaff Decl. ¶¶ 7–8 (Ex. 14); Saul Decl. ¶¶ 4–5, 13–14 (Ex. 19).

comments with BLM on the proposed expansion, organizing the local community in opposition, and filing administrative appeals and litigation at the state level.[23]

IV. THE INTERIOR DEPARTMENT PROPOSES TO REEXAMINE THE FEDERAL COAL PROGRAM AND "PAUSE" SOME FEDERAL COAL LEASING.

In response to the DOI Inspector General's and the GAO's reports, and citing agreement of "Members of Congress from both sides of the aisle," Interior Secretary Sally Jewell announced on March 17, 2015 that it was "time for an honest and open conversation about modernizing the federal coal program."[24] Secretary Jewell identified key questions that conversation should address, including: "Are taxpayers and local communities getting a fair return from these resources? How can we make the program more transparent and more competitive? How do we manage the [federal coal] program in a way that is consistent with our climate change objectives?"[25]

Accordingly, the Secretary directed BLM in the summer of 2015 to hold five "listening sessions" (four in Western states and one in Washington, D.C.) "to better understand how taxpayers, stakeholders and local communities perceive the federal government's coal program today and how we can improve and strengthen it for future generations."[26] DOI "heard from 289 individuals during the sessions and received over 92,000 written comments before the comment

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[23] *E.g.*, Shoaff Decl. ¶ 5 (Ex. 14); Peterson Decl. ¶ 4 (Ex. 21).

[24] Press Release, U.S. Dep't of the Interior, Secretary Jewell Offers Vision for Balanced, Prosperous Energy Future (Mar. 17, 2015), https://www.doi.gov/news/pressreleases/secretary-jewell-offers-vision-for-balanced-prosperous-energy-future, attached as Ex. 22.

[25] *Id.*

[26] Press Release, Bureau of Land Mgmt., Interior Department Announces Series of Public Listening Sessions on Federal Coal Program (July 9, 2015), https://www.blm.gov/press-release/interior-department-announces-series-public-listening-sessions-federal-coal-program, attached as Ex. 23.

period closed on September 17, 2015."[27] Those aspects of the federal coal program receiving the "most attention" included concerns about "American taxpayers . . . not receiving a fair return on public coal resources" and about the conflicts between the Federal coal program and national policy and goals to limit climate pollution.[28] Many of the Conservation Groups presented testimony or submitted written comments supporting measures to increase the financial return to taxpayers and to reduce the environmental and climate costs of coal mining.[29]

The Interior Department weighed these comments, considered data from BLM and other agencies, and concluded that a thorough review of the federal coal program was necessary. Secretary Jewell issued Secretarial Order 3338 on January 16, 2016, stating:

> Given the broad range of issues raised over the course of the past year (and beyond) and the lack of any recent analysis of the Federal coal program as a whole, a more comprehensive, programmatic review is in order, building on the BLM's public listening sessions. Accordingly, to meaningfully address the breadth and complexity of the issues raised by commenters regarding the Federal coal program, I hereby direct the BLM to conduct a broad, programmatic review of the Federal coal program it administers through the preparation of a PEIS [programmatic environmental impact statement] under NEPA [National Environmental Policy Act].[30]

In addition to the PEIS, Secretary Jewell ordered a "pause" on the issuance of certain new federal coal leases for thermal coal (that used for electric generation) pending the PEIS's completion because "[c]ontinuing to conduct lease sales or approve lease modifications during this programmatic review risks locking in for decades the future development of large quantities of coal under current rates and terms that the PEIS may ultimately determine to be less than

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[27] U.S. Dep't of the Interior, Secretarial Order 3338, at 3 (2016), attached as Ex. 24.

[28] *Id.*

[29] *E.g.*, Shoaff Decl. ¶ 7 (Ex. 14); Smillie Decl. ¶ 17 (Ex. 15); Nichols Decl. ¶ 12 (Ex. 18).

[30] Secretarial Order 3338, at 6–7 (Ex. 24).

optimal."[31] To minimize immediate disruption in the coal industry, the Secretarial Order identified five categories of exceptions under which federal coal leases could be approved during the PEIS's preparation.[32] The Order noted that prior administrations had conducted programmatic reviews of coal leasing accompanied by similar moratoria with limited exceptions on the issuance of new Federal coal leases: once in the 1970s, and again in the 1980s.[33]

BLM issued a formal notice on March 30, 2016 seeking public comments on its proposal to prepare a PEIS. 81 Fed. Reg. at 17,720. Most of the Conservation Groups provided written input as well as oral testimony at many of BLM's six public meetings, supporting the PEIS and measures to limit the harm from, or to eliminate, the federal coal leasing program.[34]

V. THE COUNTIES' COMPLAINT SEEKS TO OVERTURN THE COAL LEASING PAUSE AND HALT THE PEIS THAT CONSERVATION GROUPS WORKED TO ACHIEVE.

The Counties challenge the Secretary's review of the federal coal program, alleging four causes of action. First, the Counties assert that the coal leasing pause is not supported by record evidence or "objective data," was undertaken "to appease litigious environmental groups and to respond to political pressure," ignores concerns of those who benefit from coal production, and fails to consider alternatives. Compl. ¶¶ 79–95, ECF No. 2. Second, they allege that the leasing pause was adopted contrary to the evidence before the agency. Compl. ¶¶ 96–101. Third, they contend that the lease pause prevents DOI from maximizing economic recovery for coal from

[31] *Id.* at 8.

[32] *Id.* at 9–10.

[33] *Id.* at 5–6.

[34] *E.g.*, Shoaff Decl. ¶ 8 (Ex. 14); Smillie Decl. ¶ 17 (Ex. 15); Fix Decl. ¶ 5 (Ex. 17); Nichols Decl. ¶ 20 (Ex. 18); Saul Decl. ¶¶ 14–15, 17–19 (Ex. 19); *PEIS Scoping Report* app. at C-21 to -27, C-30, attached as Ex. 25.

federal lands as purportedly required by the Mineral Leasing Act, and therefore that the pause cannot achieve the stated purpose of avoiding locking in rates and terms that DOI may modify due to its review. Compl. ¶¶ 102–106.[35] Finally, they claim that DOI violated NEPA by failing to prepare an environmental impact statement before adopting the pause. Compl. ¶¶ 107–12. The Counties ask this Court to declare that DOI's actions in commencing the PEIS and adopting the leasing pause are contrary to law. Compl. 26 (Prayer for Relief).

ARGUMENT

I. CONSERVATION GROUPS ARE ENTITLED TO INTERVENE AS OF RIGHT.

Under Federal Rule of Civil Procedure 24(a), a movant is entitled to intervene as of right if: (1) the motion is "timely"; (2) the movant "claims an interest relating to the property or transaction that is the subject of the action"; (3) "disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest"; and (4) that interest is not "adequately represent[ed]" by existing parties. Fed. R. Civ. P. 24(a)(2).

The Tenth Circuit follows "a somewhat liberal line in allowing intervention." *WildEarth Guardians v. Nat'l Park Serv.* (*Nat'l Park Serv.*), 604 F.3d 1192, 1198 (10th Cir. 2010) (quoting *WildEarth Guardians v. U.S. Forest Serv.* (*U.S. Forest Serv.*), 573 F.3d 992, 995 (10th Cir. 2009)). Rule 24 factors are "not rigid, technical requirements." *San Juan Cty. v. United States*, 503 F.3d 1163, 1195 (10th Cir. 2007) (en banc). The principal focus of Rule 24(a) is on "the

[35] The Counties specifically allege that BLM's denial of an emergency exception from the coal lease pause for an expansion of Alton Coal Development's Coal Hollow mine harms Kane County's coffers. Compl. ¶¶ 19, 47–59. Alton Coal seeks to expand what is now a strip mine onto more than 2,000 acres of federal land near Bryce Canyon National Park.

practical effect of litigation on a prospective intervenor rather than legal technicalities." *Id.* at 1188, 1193. Conservation Groups satisfy each of Rule 24(a)'s requirements.

A. The Motion to Intervene is Timely.

A motion to intervene under Rule 24(a) must be timely. Fed. R. Civ. P. 24(a)(2). Timeliness is determined "in light of all the circumstances," principally "the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances." *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1250–51 (10th Cir. 2001) (citation omitted) (finding timely a motion filed two and a half years after the complaint). Where no prejudice would result, intervention is favored. *See id.* Here, the Counties filed their Complaint on November 30, 2016 (less than two months ago) and apparently have not yet served the Complaint on Federal Defendants.[36] At this earliest stage of the case, this motion is timely.

B. The Conservation Groups Have an Interest in this Case's Subject Matter.

To intervene as of right, the movant must demonstrate "an interest relating to the property or transaction that is the subject of the action." Fed. R. Civ. P. 24(a)(2). "The movant's claimed interest is measured in terms of its relationship to the property or transaction that is the subject of the action, not in terms of the particular issue before the district court." *Nat'l Park Serv.*, 604 F.3d at 1198. "With respect to Rule 24(a)(2), [the Tenth Circuit has] declared it 'indisputable' that a prospective intervenor's environmental concern is a legally protectable interest." *Id.*

[36] Courts have held that a motion to intervene cannot be considered untimely for being filed "too early." *Sierra Club v. Glickman*, 82 F.3d 106, 109 n.1 (5th Cir. 1996) (per curiam); *SEC. v. Marquis Props., LLC*, No. 2:16-CV-00040, 2016 WL 6839491, at *1 (D. Utah Mar. 15, 2016) (unpublished). That should be particularly true here where Conservation Groups have a reasonable concern that the Counties and Federal Defendants may settle the case, something that could occur concurrent with or shortly after the complaint's service. *See infra* pp. 19–20 & n.46.

(quoting *San Juan Cty.*, 503 F.3d at 1199). In addition, when litigation raises an issue of significant public interest, rather than solely private rights, "the requirements for intervention may be relaxed." *San Juan Cty.*, 503 F.3d at 1201. Conservation Groups have multiple interests in the challenged coal leasing pause and PEIS that meet the standard for intervention in this case.

1. The Conservation Groups Advocated for BLM's Coal Leasing Pause and PEIS.

Conservation Groups have an interest in this litigation because they have worked extensively to support limitations on coal leasing on federal lands, including the lease pause and PEIS, which are the property or transactions that are the subject of this action. "A public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995); *see also N.M. Off-Highway Vehicle All. v. U.S. Forest Serv.*, No. 13-2116, 540 F. App'x 877, 880, 881 n.6 (10th Cir. 2013) (unpublished) (holding environmental groups that had submitted comments and administratively sought "minor changes" to a challenged plan they largely supported had "easily" demonstrated interests sufficient to support intervention of right); *Coal. of Ariz./N.M Ctys. for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 841 (10th Cir. 1996) (holding a party with a "persistent record of advocacy" for an environmental protection measure adopted by a federal agency has a "direct and substantial interest" in defending its adoption in subsequent litigation).

Here, Conservation Groups and their members have long worked to limit the damage to public lands, the environment, and the climate caused by federal coal mining. *See supra* pp. 7–8. The Groups also specifically pressed the Interior Department to undertake a PEIS and supported a pause or an end to federal coal leasing. *See supra* p. 7, note 20. Most Conservation Groups

participated in the listening sessions that preceded Secretarial Order 3338 and prepared scoping comments on the PEIS. *See supra* notes 29, 34. Further, several of the Groups have worked to prevent the specific federal coal lease that Kane County hopes to pave the way for with this suit: Alton Coal Development's Coal Hollow expansion. *See supra* pp. 7–8, note 23. Because the Counties' Complaint attacks these years-long efforts to reform BLM's coal program, Conservation Groups show the requisite interests to warrant intervention as of right.[37]

2. Conservation Groups Have an Interest in Protecting the West's Land, Air, and Climate from Federal Coal Mining.

In addition to this history of advocacy, Conservation Groups have an interest in protecting public lands and the environment from the impacts of federal coal mining. It is "indisputable" that a movant's environmental concerns represent a legally protectable interest sufficient to support intervention. *Nat'l Park Serv.*, 604 F.3d at 1198 (citation omitted); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000) ("[E]nvironmental plaintiffs adequately allege injury in fact [for standing purposes] when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972))); *Utah Ass'n of Ctys.*, 255 F.3d at 1252 (agreeing "that organizations whose purpose is the protection and conservation of wildlife and its habitat have a protectable interest in litigation that threatens those goals").

[37] The Counties cannot allege that Conservation Groups do not demonstrate the necessary interest to intervene when the Counties themselves claim that the lease pause and PEIS were undertaken "to appease litigious environmental groups," naming WildEarth Guardians. Compl. ¶¶ 87–89; *see also* Nichols Decl. ¶¶ 9–12 (Ex. 18).

Conservation Groups' members use and enjoy public lands that are affected (or at risk of being affected) by coal leasing and development. They enjoy hiking, camping, fishing, and nature photography on or near public lands where coal leasing and mining occurs.[38] Some live and work on ranches that have been and will be affected by federal coal leasing.[39] And climate change caused by coal mining and combustion on federal lands will affect Conservation Groups' members in both their use and enjoyment of public lands and their day-to-day lives.[40] The leasing pause protects Conservation Groups' members and staff from the harmful impacts of coal development.[41] Indeed, Conservation Groups' members use and enjoy some of the specific public lands affected by the postponed lease sales identified in the Counties' Complaint, including areas on and near the federal lands Alton proposes to lease in Utah.[42]

These impacts demonstrate that Conservation Groups have legally protectable interests under Rule 24. *See Nat'l Park Serv.*, 604 F.3d at 1198; *San Juan Cty.*, 503 F.3d at 1199. Indeed, numerous courts have found conservation groups' interests in recreation, aesthetics, and the environment sufficient to support *standing* — which is a more stringent standard than

[38] *E.g.*, Saul Decl. ¶¶ 6, 21–33, 43–46 (Ex. 19); Wagner Decl. ¶¶ 8–9 (Ex. 20); Peterson Decl. ¶¶ 9–14 (Ex. 21); *see also infra* note 42.

[39] *E.g.*, Alderson Decl. ¶¶ 10–17 (Ex. 16); Fix Decl. ¶¶ 9–15 (Ex. 17).

[40] *E.g.*, Alderson Decl. ¶¶ 22–23 (Ex. 16); Fix Decl. ¶¶ 16–24 (Ex. 17); Saul Decl. ¶ 49 (Ex. 19); Wagner Decl. ¶ 10 (Ex. 20).

[41] *E.g.*, Shoaff Decl. ¶ 9 (Ex. 14); Smillie Decl. ¶ 18 (Ex. 15); Alderson Decl. ¶¶ 19–20, 30 (Ex. 16); Nichols Decl. ¶¶ 24–25, 30 (Ex. 18); Saul Decl. ¶¶ 36, 56–58 (Ex. 19); Wagner Decl. ¶ 11 (Ex. 20); Peterson Decl. ¶ 14 (Ex. 21).

[42] *E.g.*, Nichols Decl. ¶¶ 26–29 (Ex. 18); Saul Decl. ¶¶ 37–38 (Ex. 19); Wagner Decl. ¶¶ 8–9 (Ex. 20); Peterson Decl. ¶¶ 9–14 (Ex. 21).

intervention[43] — to challenge decisions to allow federal coal leasing. *E.g.*, *WildEarth Guardians v. Jewell* (*Jewell*), 738 F.3d 298, 305–06 (D.C. Cir. 2013); *S. Utah Wilderness All. v. Office of Surface Mining, Reclamation & Enf't*, 620 F.3d 1227, 1233–34 (10th Cir. 2010); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1186–87 (D. Colo. 2014).

C. This Litigation May Impair Conservation Groups' Interests.

Rule 24(a) also requires a movant to show that the litigation "may as a practical matter impair or impede the movant's ability to protect its interest." Fed. R. Civ. P. 24(a)(2). To meet this "minimal burden," a movant must show "only that impairment of its substantial legal interest is *possible* if intervention is denied." *Nat'l Park Serv.*, 604 F.3d at 1199 (emphasis added).

If the Counties succeed in this case, the benefits that the coal leasing pause and PEIS would confer on Conservation Groups' interests will almost certainly be lost. The Counties ask this Court to declare that DOI's "actions are arbitrary [and] capricious" in violation of the Administrative Procedure Act (APA). Compl. 26. By asking the Court to declare that the leasing pause and PEIS violate the APA, the Counties appear to be seeking vacatur of these decisions. *See* 5 U.S.C. § 706(2)(A) (stating courts "shall . . . hold unlawful and set aside agency action" found to be arbitrary and capricious); *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 78 (D.D.C. 2010) ("[R]emand, along with vacatur, is the presumptively appropriate remedy for a violation of the APA.").[44] A court order declaring illegal and setting aside the lease pause could

[43] "[B]ecause Article III standing requirements are more stringent than those for intervention under Rule 24(a), a determination that intervenors have Article III standing compels the conclusion that they have the requisite interest under [Rule 24(a)]." *Utah Ass'n of Ctys.*, 255 F.3d at 1252 n.4.

[44] Conservation Groups reserve the right to argue that setting aside the lease pause and PEIS is not the appropriate remedy in this case if this Court rules for the Counties on the merits.

pave the way for the prompt approval of pending lease applications that otherwise would not have been processed pending the outcome of the PEIS, including that for the Alton mine. The Counties' requested relief could also undercut the potential benefits of the PEIS by, in the Interior Secretary's words, "locking in for decades the future development of large quantities of coal under current rates and terms that the PEIS may ultimately determine to be less than optimal."[45] Locking in such coal development that would be delayed and possibly reduced under the lease pause and PEIS would harm Conservation Groups' interests in protecting natural resources and in reducing greenhouse gas pollution.

D. Federal Defendants May Not Adequately Represent the Groups' Interests.

Rule 24(a) requires that movants show their interests may not be adequately represented by existing parties. Fed. R. Civ. P. 24(a)(2). The Supreme Court has emphasized, "The requirement of [Rule 24(a)(2)] is satisfied if the applicant shows that representation of his interest '*may be*' inadequate; and the burden of making that showing should be treated as *minimal*." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 & n.10 (1972) (emphases added); *Nat'l Park Serv.*, 604 F.3d at 1200 (explaining that to meet this "minimal burden," the movant need only show "the possibility that representation may be inadequate").

The Tenth Circuit has "repeatedly recognized that it is 'on its face impossible' for a government agency to carry the task of protecting the public's interests and the private interests of a prospective intervenor." *Nat'l Park Serv.*, 604 F.3d at 1200 (citation omitted); *accord U.S. Forest Serv.*, 573 F.3d at 996; *Utah Ass'n of Ctys.*, 255 F.3d at 1255–56. Even when both the government and a prospective intervenor take the same position at the outset of the litigation, "In

[45] Secretarial Order 3338, at 8 (Ex. 24).

litigating on behalf of the general public, the government is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor." *Utah Ass'n of Ctys.*, 255 F.3d at 1255–56 (rejecting argument that because government and environmental intervenors both sought to defend environmental protection measure, government would adequately protect intervenors' interests). As such, the inadequacy of representation requirement is satisfied "[w]here a government agency may be placed in the position of defending both public and private interests." *Nat'l Park Serv.*, 604 F.3d at 1200.

That is the case here. Federal Defendants cannot adequately represent Conservation Groups' focused interests in advancing environmental values because the agency operates under the broad statutory mandate to manage public lands for "multiple use," a standard that requires balancing both mineral extraction and environmental protection. *See* 43 U.S.C. §§ 1702(c), 1712(c)(1). Because DOI must balance other uses, such as coal development, that may directly conflict with Conservation Groups' interests, the agency cannot adequately represent the Groups. *Coal. of Ariz./N.M Ctys*, 100 F.3d at 845 ("We have here . . . the familiar situation in which the governmental agency is seeking to protect not only the interest of the public but also the private interest of the petitioners in intervention, a task which is on its face impossible." (alteration in original) (citation omitted)); *see also Utah Ass'n of Ctys.*, 255 F.3d at 1255–56.

Indeed, DOI's past actions demonstrate that it cannot be counted on to represent Conservation Groups' interests. The Groups have repeatedly sued BLM for failing to address many issues that the Interior Secretary has now directed BLM to address in the PEIS. *See, e.g.*, *Jewell*, 738 F.3d at 301 (WildEarth Guardians and Sierra Club, among others, challenging BLM and Forest Service's failure to properly address environmental impacts of coal lease); *WildEarth*

Guardians v. U.S. Office of Surface Mining, Reclamation & Enf't, 104 F. Supp. 3d 1208, 1214 (D. Colo. 2015) (WildEarth Guardians challenging DOI's failure to address environmental impacts of coal mine expansion), *vacated as moot*, 652 F. App'x 717 (10th Cir. 2016); *High Country Conservation Advocates*, 52 F. Supp. 3d at 1181 (WildEarth Guardians and Sierra Club, among others, challenging BLM and Forest Service's failure to address environmental impacts of coal lease modifications and coal exploration plan); Nichols Decl. ¶ 11 (referencing challenge to federal coal lease brought by WildEarth Guardians and Grand Canyon Trust) (Ex. 18). BLM also previously rejected a WildEarth Guardians petition to reform the federal coal leasing program in Wyoming's Powder River Basin. *See* Nichols Decl. ¶ 11 (referencing November 2009 petition) (Ex. 18); Compl. ¶ 34. In addition, DOI recently defended a suit brought by the Western Organization of Resource Councils to compel DOI to undertake a programmatic review of the federal coal program. *W. Org. of Res. Councils*, 124 F. Supp. 3d 7. Because Conservation Groups' interests are not wholly aligned with BLM's, the Groups meet the "minimal" burden of showing that Federal Defendants may not adequately represent their interests.

It is also likely that BLM will cease to defend the coal leasing pause and PEIS process. *See Utah Ass'n of Ctys.*, 255 F.3d at 1256 (granting intervention and noting that "it is not realistic to assume that the agency's programs will remain static or unaffected by unanticipated policy shifts" (citation omitted)); *see also U.S. Forest Serv.*, 573 F.3d at 997 (recognizing that coal mine should not be required to rely on government to protect its interests because government could shift policy to embrace environmental objectives). The chances of a shift in agency policy are higher in a case like this where the Secretarial Order was adopted during one presidential administration but will be litigated by another. *See, e.g., Kootenai Tribe of Idaho v.*

Veneman, 313 F.3d 1094, 1107 (9th Cir. 2002) (in granting intervention of right to conservation groups, noting George W. Bush administration stopped defending challenge to Roadless Rule promulgated by Clinton administration), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011). Here, President-elect Trump's campaign and his transition team have publicly vowed to terminate the coal leasing pause, making it likely that the next administration will not defend this suit or will settle with the Counties.[46] Conservation Groups thus cannot rely on DOI to represent their interests.

Because each of the four requirements under Rule 24(a)(2) is satisfied, the Court should grant Conservation Groups intervention as of right.

II. IN ADDITION, THIS COURT SHOULD GRANT CONSERVATION GROUPS PERMISSIVE INTERVENTION.

Conservation Groups also satisfy the requirements for permissive intervention under Rule 24(b). Permissive intervention is appropriate where the movant demonstrates: (1) it has a claim or defense that shares a common question of law or fact with the main action; (2) the intervention will not cause undue delay or prejudice; and (3) the motion to intervene is timely. Fed. R. Civ. P. 24(b). Courts may also consider whether the intervenor will "significantly contribute to the underlying factual and legal issues." *Utah ex rel. Utah State Dep't of Health v. Kennecott Corp.*, 801 F. Supp. 553, 572 (D. Utah 1992).

Here, Conservation Groups intend to address the same questions of law that are at the heart of this litigation: BLM's legal authority to adopt the coal leasing pause and to consider

[46] *Energy*, Donald J. Trump for President, https://www.donaldjtrump.com/policies/energy/ (last visited Jan. 12, 2017) (stating Mr. Trump's vision includes "eliminate moratorium on coal leasing"), attached as Ex. 26; *Energy Independence*, GreatAgain.gov, https://greatagain.gov/energy-independence-69767de8166#.gyimz5f2x (last visited Jan 12, 2017) ("We will . . . rescind the coal mining lease moratorium"), attached as Ex. 27.

overhauling the federal coal program without committing to numerous additional leases in the interim. This motion is timely, and intervention will not cause delay or prejudice the existing parties. *See supra* p. 12. Moreover, due to their extensive involvement in federal coal leasing decisionmaking, and in listening sessions and scoping on the PEIS, and their perspective as impacted parties, Conservation Groups will significantly contribute to the underlying factual and legal issues. *See supra* pp. 7–8, 13–14. As such, permissive intervention is also warranted.

CONCLUSION

Because Conservation Groups meet each of the standards under Rule 24(a)(2), they merit intervention of right. In addition, the Court should grant Rule 24(b) permissive intervention.

Respectfully submitted this 13th day of January, 2017,

/s/ Heidi J. McIntosh
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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2017, the foregoing **MOTION TO INTERVENE AS DEFENDANTS** was filed with the Clerk's Office using the CM/ECF System which will send notification of this filing to plaintiffs' counsel of record:

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In addition, I certify that on January 13, 2017, the following parties listed below, who have not yet made an appearance in this case, were also served via certified mail/return receipt:

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TABLE OF EXHIBITS

Number	Exhibit Title
1	Inspector General, *Coal Management Program, U.S. Department of the Interior*
2	Government Accountability Office, *Coal Leasing: BLM Could Enhance Appraisal Process, More Explicitly Consider Coal Exports, and Provide More Public Information*
3	National Research Council, *Toxicological Effects of Methylmercury*
4	U.S. Energy Information Administration, *Coal & the Environment – Energy Explained*
5	U.S. Energy Information Administration, *Frequently Asked Questions, How much of U.S. carbon dioxide emissions are associated with electricity generation?*
6	U.S. Bureau of Land Management, *Federal Coal Program, Programmatic Environmental Impact Statement – Scoping Report*
7	David Archer, et al., *Atmospheric Lifetime of Fossil Fuel Carbon Dioxide*
8	Intergovernmental Panel on Climate Change, *Climate Change 2014, Synthesis Report, Summary for Policymakers*
9	John T. Abatzoglou & A. Park Williams, *Impact of anthropogenic climate change on wildfire across western US forests*
10	U.S. Environmental Protection Agency, *What Climate Change Means for Utah*
11	Toby R. Ault, et al., *Relative impacts of mitigation, temperature, and precipitation on 21st-century megadrought risk in the American Southwest*
12	The White House, Fact Sheet: What Climate Change Means for Utah and the Southwest
13	Christophe McGlade & Paul Ekins, *The Geographical Distribution of Fossil Fuels Unused When Limiting Global Warming to 2 °C*
14	Declaration of Nathaniel Shoaff
15	Declaration of John Smillie
16	Declaration of Jeanie Alderson
17	Declaration of Mark Fix
18	Declaration of Jeremy Nichols
19	Declaration of Michael Saul
20	Declaration of Tim D. Wagner
21	Declaration of Tim D. Peterson

Number	Exhibit Title
22	U.S. Department of the Interior, Secretary Jewell Offers Vision for Balanced, Prosperous Energy Future
23	Bureau of Land Management, Interior Department Announces Series of Public Listening Sessions on Federal Coal Program
24	U.S. Department of the Interior, Secretarial Order 3338
25	U.S. Bureau of Land Management, *Federal Coal Program, Programmatic Environmental Impact Statement – Scoping Report*, Appendices
26	*Energy*, Donald J. Trump for President
27	*Energy Independence*, GreatAgain.gov